

Askan Holdings v. USA

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8/17/2021

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 10:12 a.m.)

4 THE COURT: This is argument on the Defendant's
5 motion to dismiss in Askan Holdings, Limited, vs. United
6 States, Docket Number 20-1870. Let's begin with
7 appearance of counsel for the record, then I'll go over a
8 couple of ground rules as to how I tend to conduct these
9 virtual hearings, and then we will get started. But let
10 me ask Ms. Taylor to make her appearance for the record,
11 please.

12 MS. TAYLOR: Yes, Teresa Taylor, Butzel Long,
13 attorney for the Plaintiff, Askan Holdings, LLC.

14 THE COURT: Good morning, Ms. Taylor. And do
15 you have anybody else on the line with you?

16 MS. TAYLOR: I do. Lindsey Dennis.

17 MS. DENNIS: Yes, Your Honor. Lindsey Dennis.
18 I am an associate with Ms. Taylor.

19 THE COURT: Good morning, Ms. Dennis. Nice to
20 have you with us.

21 Anybody else, Ms. Taylor?

22 MS. TAYLOR: I'm not sure. We have one
23 attorney who's listening in, but I'm not sure that he is
24 on the line. It looks like he has not connected yet.

25 THE COURT: Okay.

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1 Mr. Yale, would you please make your appearance
2 for the record.

3 MR. YALE: Sure, Your Honor. It's Nathaniel
4 Yale from the Department of Justice on behalf of the
5 Defendant, the United States.

6 THE COURT: And do you have agency counsel on
7 the line with you that you'd like to introduce?

8 MR. YALE: No. We don't have anyone else who's
9 going to be making an appearance in this case, for this
10 hearing, Your Honor.

11 THE COURT: Okay. Thank you, Mr. Yale. Mr.
12 Yale, I trust you did not go to Harvard.

13 MR. YALE: No, I went to Michigan and Cornell,
14 but I did grow up around New Haven and went to high
15 school there, so...

16 THE COURT: Are you related to Elihu Yale?

17 MR. YALE: Well, it's a little complicated.
18 Maybe very, very, very, very faintly.

19 THE COURT: Okay. Well, good morning. Good
20 morning to both counsel.

21 The way we will proceed -- this is the way I've
22 been doing it since we began our virtual hearings when
23 the pandemic started, because of the slight delay in the
24 audio, and the fact that it being virtual, you're not
25 really necessarily focused on me. You're not going to

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1 see me kind of leaning forward in my chair to ask a
2 question.

3 I have found it useful -- and we will proceed
4 this way -- that I will give each counsel up to ten
5 minutes uninterrupted by questions from me to lay out
6 your argument. You don't have to conclude within ten
7 minutes. In fact, I don't impose time limits, so you'll
8 be able to go as long as you'd like, but you'll get ten
9 free minutes without questions in order to lay out your
10 argument.

11 After ten minutes are up, I will feel free to
12 intervene with questions, but I may not have any
13 questions after the ten minutes are up, so don't stop
14 after ten minutes and look at me waiting for a question.
15 I will ask questions once the ten minutes are up. I will
16 ask questions as they occur to me or when I want, but you
17 should keep going unless and until I ask a question.

18 As I say, take as much time as you need in the
19 opening -- your opening round, and as I will with my
20 questions. We will then go back and forth, and I'll give
21 each counsel as many opportunities as you think you need
22 to address any issues that are out there or respond to
23 arguments or comments that opposing counsel have made
24 until everything is -- until each side considers that it
25 has made its complete argument.

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1 To that -- to that effect, though, because you
2 will have as many opportunities as you need to respond to
3 arguments that opposing counsel makes, I would ask that
4 you not interrupt your opposing counsel when he or she is
5 speaking. You will have the opportunity to rebut and
6 respond when it's your turn, but it's just -- I say, on
7 the video, it's just easier if we don't go back and
8 forth, if there are no interruptions. So I would ask
9 you, just -- if opposing counsel says something that you
10 think calls for a response, please just jot it down, and
11 you will have the opportunity to offer that response when
12 it's your turn.

13 When you are not speaking, I ask that you keep
14 yourself -- each of you -- on mute to reduce the feedback
15 and echoing. And with that, I don't think I have
16 anything further before we go ahead and get started.

17 Mr. Yale, any preliminary matters you wish to
18 broach with me?

19 MR. YALE: No, Your Honor.

20 THE COURT: Okay, thank you.

21 Ms. Taylor, any preliminary matters that you
22 wish to broach?

23 MS. TAYLOR: No, Your Honor.

24 THE COURT: Okay. Thank you. Then, Mr. Yale,
25 we are here on the Defendant's motions, so the floor is

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1 yours. Please proceed.

2 MR. YALE: Thank you, Your Honor, and may it
3 please the Court. As we established in our moving
4 papers, Askan's suit suffers from several deficiencies
5 that mandate dismissals. We'd first like to address a
6 couple of the jurisdictional deficiencies. So to begin,
7 Section 1500, a longstanding statutory bar, precludes
8 this Court from exercising jurisdiction over the suit.
9 That's because, as we laid out in our motion papers, at
10 the time that it filed its original complaint in this
11 case, Askan had a suit pending in the District Court
12 based on the same set of operative facts.

13 So it's well established that Section 1500 has
14 a general, two-part inquiry. I'm not really going to hit
15 much on the first prong because I think there's agreement
16 that there was an earlier suit pending in another court,
17 the District Court for the District of Columbia, so, you
18 know, as of the date of the filing of this case, which
19 was December 16, 2020, there was a suit pending. So I'm
20 not going to address that any further.

21 So that first prong is met, and the second
22 prong is also clearly met. And under the second prong,
23 two suits are for and respect to the same claim when
24 they're based upon substantially the same operative
25 facts. So there's a few principles I just want to stress

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1 about this second prong inquiry. First, the relief
2 requested in the two suits is irrelevant. The legal
3 theories -- the Federal Circuit and the Supreme Court
4 have clearly held that that's also not germane to the
5 inquiry.

6 And the other principle I want to hit on is
7 that when you're conducting this inquiry, it's as of the
8 date of the filing of the complaint in this case. And so
9 any subsequent efforts to amend the complaint or whatnot,
10 I mean, those are -- those are irrelevant, and that's --
11 that's been clearly held in a number of cases in the
12 Federal Circuit -- Resource Investments; Central Pines
13 clearly held that.

14 So the inquiry is comparing the factual
15 allegations in the original complaint here with the
16 operative District Court complaint. Here, it would be
17 the amended complaint from the District Court. And when
18 you conduct that inquiry, there could -- it's clearly
19 based upon the same operative facts. I mean, frankly,
20 it's -- you know, most of these factual allegations are
21 just copied and pasted from the District Court case. The
22 two complaints, they involve the same purported property
23 interest, so this money, and it's the same alleged
24 government conduct. So we have the blocking of the funds
25 by OFAC, the alleged failure to timely grant a license

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1 and return the funds, and the factual allegations with
2 respect to this license that was issued to the State of
3 New York, which allegedly resulted in this escheat.

4 And so when you look at those operative facts,
5 I mean, not only is there substantial overlap, I mean,
6 what we're talking about -- well, it's essentially the
7 same factual allegations. And so there's really only one
8 avenue here, and it's dismissal based upon 1500. So I'll
9 address just very briefly a couple of the arguments that
10 Askan has made in this case with respect to 1500. They
11 primarily seem to suggest that what we're talking about
12 is an overlap of background facts. I mean, that's just
13 not true. I mean, that's -- if you compare the factual
14 allegations -- and we did this in our moving papers --
15 it's clearly essentially a complete overlap there.

16 And, for example, in their response brief, they
17 mentioned that, well, this Court of Federal Claims case
18 is about delay, and the other case doesn't have those
19 factual allegations. Well, I mean, there's an entire
20 count of the complaint that talks about unreasonable
21 delay. So, I mean, I'm happy to address certainly later
22 any of those arguments, but if ever there's a case for
23 1500, this is certainly it, and based upon the
24 longstanding precedent, including Supreme Court
25 precedent, it has clearly stated that 1500 is a broad

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1 prohibition. I mean, this suit is clearly barred by
2 1500.

3 You know, I'll generally -- I'll just sort of
4 briefly touch on some of these -- some of the other
5 arguments that we set forth, and I only have ten minutes,
6 so --

7 THE COURT: Oh, no, you have as much time as
8 you need. You don't have only ten minutes. That's why I
9 say, you only have ten minutes before I start asking
10 questions. You've got all the time you want to take.

11 MR. YALE: Oh, okay, Your Honor.

12 THE COURT: So take all the time you want, just
13 after ten minutes, I will feel free to start asking you
14 questions.

15 MR. YALE: Understood, Your Honor.

16 THE COURT: And the same goes for Ms. Taylor.
17 She'll have all the time she needs.

18 MR. YALE: Understood, Your Honor, and I
19 apologize for that.

20 So moving on to sort of our second argument,
21 which is really an argument about extraterritorial
22 jurisdiction and standing, so we think it's clear from
23 the case law that when you have a foreign plaintiff they
24 have to demonstrate standing to bring a Fifth Amendment
25 takings -- a Fifth Amendment takings claim in this Court.

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1 And so Plaintiff has set -- has really offered very
2 little with respect to how they're meeting the standard
3 requirement.

4 There's really sort of two allegations that
5 they've put forth. The first is that the funds were
6 taken in the United States, and as we -- as we pointed to
7 in our papers, we think that that's just legally
8 insufficient. Here -- first of all, the standing inquiry
9 has to be independent from the takings argument, the
10 takings claim, and we don't think that that's -- that's
11 met here.

12 Also, you know, in their response brief, they
13 discussed this sort of clearing process of the funds,
14 but there's no allegations to that effect in their
15 amended complaint in this Court. And, you know, it's
16 certainly -- you know, there's no allegations that they
17 had knowledge that these funds would ever even pass
18 through, you know, an American bank. And even if that
19 was the case, we have -- we haven't found any case that
20 would suggest that the mere fact that funds passed
21 briefly through an American bank would constitute
22 sufficient grounds for constitutional standing.

23 The other sort of -- the other allegation that
24 they've similarly pointed to is an allegation that in
25 this transaction there was an American company, in this

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1 transaction that eventually fell apart. Again, that's
2 just really -- that's really hardly any connection at
3 all. It's certainly not a significant connection. You
4 know, no court, as far as we've been able to ascertain,
5 has pointed to the fact that there's one failed
6 transaction with a U.S. company is sufficient for
7 constitutional standing.

8 And, you know, we certainly recognize that
9 there's a couple of cases in this Court where U.S.
10 essentially contractors who are essentially
11 subcontractors on U.S. Government contracts were able to
12 demonstrate standing under -- you know, under the Fifth
13 Amendment, but in both of those cases, what you have is
14 preexisting contractual relationships with the United
15 States. So we're talking about several instances where
16 those plaintiffs were prime contractors on government
17 contracts.

18 And, here, there's just really, you know, just
19 very little that's been offered and certainly nothing
20 that any court has ever found sufficient to bring a
21 constitutional claim. And so we think that that really
22 contravenes the well established Supreme Court precedent
23 on extraterritorial standing.

24 So those are the two jurisdictional
25 deficiencies, so I'll move on sort of to whether or not

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1 there's actually -- Plaintiffs have actually stated a
2 taking claim as a matter of law, and we think as we set
3 forth in our motion papers that the police power
4 doctrine, as an initial matter, would bar this claim.
5 So, you know, we set forth -- set forth in our briefing
6 that there's -- it's well established, there's certain
7 exercises of the police power that courts have never
8 found to be a taking. We note that in the Court of
9 Federal Claims in the Chichakli decision that Chief Judge
10 Kaplan, you know, had a decision that specifically
11 applied that doctrine to an OFAC sanctions case. And so
12 we think that the police power doctrine would bar --
13 would bar there being a takings claim as a matter of law.

14 THE COURT: Mr. Yale, let me ask you about
15 that. And I realize you're using the language the
16 Circuit has used, so I'm not -- I'm not questioning your
17 reliance on the doctrine, and far be for me to call into
18 question anything that a higher court does, but we all
19 learn in first-year constitutional law class in law
20 school that the national government is a government that
21 exercises only the powers enumerated in the United States
22 Constitution. Where in the United States Constitution is
23 the Federal Government afforded police power?

24 MR. YALE: Well --

25 THE COURT: We all know traditionally police

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1 power belongs to the states, as the initial sovereign
2 entities, endowed with the power that they absorbed from
3 the royal warrant that they received in being
4 established, so we know that the states exercise police
5 power. But what the United States Government is doing
6 here and what -- the power Congress is exercising in
7 IEEPA and that the President is, therefore, exercising
8 pursuant to legal authority granted him by IEEPA, it's
9 not really the police power we're talking about, is it?
10 I know the Circuit has used that term, but it's not the
11 police power, is it, because the national government
12 doesn't really have police power, does it?

13 MR. YALE: Well, I think the case law has used
14 that in the context of -- for example, the Federal
15 Circuit in Florida Rock has said that when we're talking
16 -- obviously the states have sort of a general police
17 power. When we're talking about the Federal Government's
18 police power, obviously, the Federal Government has to
19 act pursuant to some enumerated power. So, you know, if
20 they're acting pursuant to the taxation clause or the
21 commerce clause or whatnot, the courts have essentially
22 coined this term, you know, sort of police power for
23 certain exercises, particularly where, you know, the
24 Federal Government is acting for public health and safety
25 in particular and certain exercises of it. You know --

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1 THE COURT: So is this --

2 MR. YALE: -- the other way to --

3 THE COURT: -- is this -- let me ask. Is this
4 power -- is this power pursuant to the congressional
5 authority and the national authority to regulate and
6 conduct foreign affairs, or does it derive from the
7 President's commander-in-chief power and Congress'
8 authority to regulate the -- pass laws regarding the
9 national defense?

10 MR. YALE: Well, I think --

11 THE COURT: And it's really a national defense
12 issue, isn't it? It's not really technically police
13 power as we would understand it when the state exercises
14 it.

15 MR. YALE: Well, I think it's a little
16 different because the state -- states obviously cannot
17 conduct foreign affairs and whatnot, but I --

18 THE COURT: Right.

19 MR. YALE: -- think that it can be explained by
20 both. I mean, there's -- there's a statute -- overall
21 statutory framework in this case, and obviously there's
22 an executive order which has to do with the President,
23 you know, acting pursuant to national security. But I
24 think more broadly what the courts, including the Federal
25 Circuit, have sort of really focused on is there's

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1 certain exercises of this power that have never been
2 found to implicate the takings clause. So -- and that's
3 really what -- that's really what we're focusing on. So
4 every time the Government acts does not necessarily
5 implement the takings clause in particular. And, you
6 know, we think that this OFAC blocking -- you know,
7 blocking of this transactions falls within that.

8 And we can sort of -- you know, I'm also -- you
9 know, we made a number of other arguments with respect to
10 just takings doctrine as well, but we do think that this
11 falls just based on Federal Circuit precedent, which has
12 to control in this case, that this -- you know, this
13 would fall squarely within that.

14 THE COURT: You know, the -- granted, it's
15 inconsistent with the regulatory and statutory scheme,
16 and indeed would be incoherent, if OFAC or Treasury were
17 to -- were to block -- were to confiscate property that
18 belonged to a terrorist -- we'll use the terrorist
19 because we're talking about the terrorist designation
20 here. It would be incoherent for the terrorist, or the
21 person whose property was seized or blocked to turn
22 around and be able to maintain a taking action, a takings
23 action in this Court.

24 But -- and many of the cases deal with that
25 scenario. Does it make a difference, does it make a

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1 legal difference, if the Plaintiff alleges complete
2 innocence, that -- as Askan has here, that the property
3 that was blocked, in fact, bears no connection to a
4 terrorist, and I presume that the allegation -- they
5 don't make an allegation, but I presume that the notion
6 is OFAC made a mistake, right? Maybe the Plaintiff's
7 owner has -- shares a name or has a similar name with
8 somebody who is, you know, a terrorist and, I mean, you
9 know, we've read in the papers, you know, just in public
10 that people who share -- I remember early on, after 9/11,
11 Senator Kennedy got popped at the airport because there
12 was somebody on the terrorist watch list named Edward
13 Kennedy. I don't know if he was an IRA person or what.
14 So we know the terrorist watch list can make
15 mistakes. We know -- and it's been public and I believe
16 that -- I believe the executive has acknowledged that in
17 some instances, particularly when you're dealing with
18 foreign names that have to be transliterated into
19 English, or spelled with English -- you know, with -- in
20 the Latin alphabet, even though they normally aren't,
21 although I think Turkish is spelled with a Latin
22 alphabet, but mistakes do happen. So here, the Plaintiff
23 is saying we have no idea what happened here, but there's
24 no -- there's no terrorist involved in our organization,
25 and so OFAC made a mistake.

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1 In that context, that distinguishes to some
2 extent between the cases where you've had -- and between
3 the purpose of the blocking and not -- does that make a
4 difference as far as the Defendant is concerned, that the
5 Plaintiff has alleged it and its ownership interest are
6 completely innocent of the -- of warranting being put on
7 the terrorist watch list? Or does that make a difference
8 for the Fifth Amendment takings claim?

9 MR. YALE: It makes no difference, and we cited
10 those cases. I mean, that's -- the Federal Circuit has
11 held that. That's the Kam Almaz case, where there was
12 certainly a dissent in that case, essentially pointing
13 that out, that maybe in some certain circumstances, and
14 I'm not going to, you know, sort of characterize this one
15 or not, that there could be some sort of unfairness
16 component or whatnot, but the fact that somebody is
17 claiming innocence, it's irrelevant. It's legally
18 irrelevant.

19 And that's also being derived from the Bennis
20 case, and so we -- that's really, at least at the Federal
21 Circuit level, that's black letter law that that just
22 doesn't go into the equation. And the other component to
23 that is if -- there's a distinction here because if
24 you're -- if you're bringing a takings claim, you have to
25 concede that it's authorized and lawful. And so when

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1 there's no jurisdiction, if what you're saying is, well,
2 if there was actually sort of a proper blocking here, we
3 have no takings claim, but this was not proper. So
4 that's something. That's a situation where, again, the
5 Federal Circuit has consistently held there would be no
6 jurisdiction because your takings claim is one-to-one
7 relying upon the act that the action was not authorized
8 in law.

9 THE COURT: So the answer there would be -- the
10 Plaintiff would have to go bring an APA claim in the
11 District Court first, saying the blocking is -- was not
12 properly authorized because we don't -- you know, we
13 don't belong on the terrorist watch list, and that's an
14 APA claim. It's not a claim for monetary relief in our
15 Court.

16 MR. YALE: It's not a monetary -- a claim for
17 monetary relief in our Court. That's correct, Your
18 Honor.

19 THE COURT: Okay. Thank you. Please proceed.
20 Go ahead.

21 MR. YALE: And so just -- you know, so with
22 respect to the police power cases, I mean, it's well
23 established that, you know, you're not getting into any
24 of sort of the normal takings test, but, you know, sort
25 of -- even if we're -- and we, obviously, you know, have

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1 just gone through why the takings claim should be
2 dismissed based upon the police power doctrine, but even
3 if we're getting -- going to get into sort of applying
4 sort of a takings framework, you know, Plaintiffs also
5 can't -- just as a matter of law can't meet that. So,
6 you know, in general, when we're talking about regulatory
7 takings, it's the Penn Central framework. And so we have
8 here -- you know, you have to have an economic impact.

9 So we have a situation here -- and the economic
10 impact has to be, you know, pretty severe, so we have
11 here a situation where at this point in time, I mean,
12 Plaintiffs have received their funds back with interest,
13 and so any economic impact is just going to be, at best,
14 marginal. Really we don't really see that there's any
15 cognizable economic impact.

16 Now, Plaintiffs have pointed to a couple of
17 things. They sort of -- they've mentioned that their --
18 you know, I guess their parent company is -- went
19 bankrupt or whatnot. They've pointed -- I mean, those
20 are, at best, consequential damages. Really, I'm not
21 even sure how a -- you know, a plaintiff can even have
22 standing to really even be bringing such a claim for
23 their parent company, but regardless, I mean, those are
24 the -- what was allegedly taken here was funds, was
25 money. And so, you know, they've gotten that back with

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1 interest. And when you're looking at the economic impact
2 under a takings claim, that's the analysis.

3 You know, again, when we get into the other
4 prongs of Penn Central, you know, we already talked about
5 the government action to some extent. You know, here,
6 you know, we're not aware of any -- any -- not a single
7 takings case where a court has ever found, you know, OFAC
8 sanctions to constitute sufficient government action for
9 a taking. And, obviously, that overlaps, to some extent,
10 with the police power doctrine, but what we're talking
11 about here are -- I mean, these are regulations trying to
12 protect the country against terrorism and obviously
13 implicates national security concerns. And so, you know,
14 we think that that prong strongly weighs against the
15 finding of a taking here.

16 You know, Plaintiff, with respect to
17 investment-backed expectations, I mean, there was nothing
18 in the amended complaint about investment-backed
19 expectations, but, you know, we've sort of pointed out
20 that, you know, international commerce, international
21 banking is a highly regulated industry. You know, we
22 think that when you're conducting such transactions that,
23 look, you have to be aware that the Government has had a
24 longstanding -- longstanding statutory scheme here.

25 Plaintiff has raised sort of this context

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1 argument about delay. I think in the response brief,
2 they had this as a fourth prong of -- a fourth fact. I
3 mean, I think it's relative -- it's pretty clear based
4 upon the case law -- Apollo is a case in the Federal
5 Circuit that, you know, delay, if anything, would have to
6 be addressed in the character of the government action
7 prong, but they've certainly -- you know, they haven't --
8 they certainly have not really even on the face alleged
9 any sort of, you know, sufficiently extraordinary delay
10 here. And they really never explained why sort of in the
11 first instance they couldn't have gone, you know, to
12 District Court and raised these issues much earlier.

13 And at the end of the day, the delay they're
14 pointing to seemingly seems to be a delay between this
15 October 2019 reconsideration, and when in August 2020
16 there was a license issued by OFAC to New York State.
17 And we just don't think that that really just, even on
18 its face, would sort of constitute anything that would
19 sort of detract from the character of the government
20 action in a case like this, just weighing so heavily
21 against the finding of a taking.

22 And, you know, we also -- you know, I'm sort of
23 also happy to address sort of, like, any per se takings
24 theory. To the extent they're arguing that this would be
25 a Lucas taking, there's -- you know, it's -- they've

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1 obviously -- they've received the money back. There's no
2 such thing as a temporary Lucas taking. That's straight
3 out of Tahoe Sierra. The Government here didn't
4 appropriate. There's no physical appropriation of these
5 funds.

6 There's -- you know, it would be a strange
7 finding to have a situation where there's somehow a
8 physical taking where the Government hasn't appropriated
9 the funds and is paying -- and the statutory scheme said
10 they're getting commercially reasonable interest. So we
11 certainly don't think that any per se taking theory would
12 apply here, and under Penn Central, we think, as a matter
13 of law, it's not a taking. And that's even after
14 Plaintiffs would have to sort of get past the initial
15 hurdle that we talked about, and in particular 1500,
16 which we think just clearly -- there's really only one
17 avenue with respect to this case on sort of
18 jurisdictional grounds, which is dismissal based upon
19 1500.

20 THE COURT: Well, let me ask you about that,
21 and as you closed the circle very nicely on taking this
22 back to where you started. I know you were dismissive of
23 the Plaintiff's acknowledged recognition that the
24 background facts between the Plaintiff's suit in the
25 District Court and its suit here are the same, of course,

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1 the background facts are. But what do you make of the
2 Plaintiff's argument that what the Plaintiff is
3 challenging in the District Court are the acts of the
4 United States and the Comptroller of New York State,
5 subsequent to the initial blocking of the funds, and that
6 the operative facts undergirding the District Court suit
7 are facts that -- to what transpired after OFAC directed
8 Deutsche Bank to block the funds, to not complete the
9 transaction -- the remittance transaction?

10 Whereas the suit here deals with OFAC's initial
11 decision to block the funds, that that was the taking,
12 that's what's being challenged here. Now, that may --
13 that goes to, you know, the substantive point you were
14 just making, well, if they got the money back with
15 interest, can there be any taking here whatsoever? Is
16 there ever -- is there any case anywhere that approves
17 the award of consequential damages for, you know, or a
18 non-taking because somebody had to do some work to, you
19 know -- to address an alleged taking?

20 That may go -- you know, that may go to my
21 opportunity to get to your (b)(6) argument, but why isn't
22 the Plaintiff's response to your 1500 argument correct,
23 that what they're complaining about here is the blocking,
24 and what they were complaining about in the District
25 Court, sure, they -- it involves the same run of facts

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1 leading up to -- to, quote, the blocking, but then the
2 District Court action builds on that and says what
3 they're complaining about in the District Court is not
4 the blocking; it's the things that OFAC did post-blocking
5 that brings the Plaintiff to the District Court. Why
6 isn't that sufficiently distinct to enable the Plaintiff
7 to evade the stricture of Section 1500?

8 MR. YALE: Well, Your Honor, that's just wholly
9 disconnected from the actual complaint. So I'll -- just
10 -- even if you just look at Count 1 of their complaint
11 here, which is the original complaint, by failing to
12 provide Askan with legally sufficient notice and a
13 hearing required under the due process clause, if you go
14 through all of these factual allegations, all of this is
15 after the initial blocking, and the blocking is -- the
16 initial blocking is not just what's at issue as pled in
17 this original complaint in this case, because the
18 blocking lasted for -- they're saying -- four years or
19 however -- however long it's been, but the factual -- the
20 facts that they're pointing to under these two claims are
21 the very same.

22 And, you know, that's obviously copy and
23 pasted or whatnot, but that's what they're saying the
24 takings are. The takings are a blocking transaction
25 without due process. That's Count 1 in this complaint,

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1 and so that's not just -- that's just not the initial
2 blocking by OFAC. What they're talking, among other
3 things, you know, they're talking about they were not
4 provided with information, and so that's just -- that's
5 just -- I mean, I guess in theory, you know, if they had
6 a completely different complaint and they had some legal
7 basis to point to, but they can't point to that here, and
8 in her -- and in their response brief, they cited -- they
9 made zero citations to their complaint because, you know,
10 it doesn't support that. It's a straightforward 1500
11 analysis. It's the same -- you mentioned the
12 comptroller's license.

13 So that was after this sort of initial
14 blocking, but that's Count 2 here, a legal comptroller's
15 license, and it's all going to the point that there was a
16 blocking, and then there were actions taken by the
17 Government where they're claiming they were not able to
18 get their money back. And that's supporting these
19 takings claims, but it's the same factual allegations
20 from the District Court. And so there's no -- there's
21 just absolutely no daylight there, with all due respect
22 to sort of this background facts argument.

23 THE COURT: I have no further questions at this
24 point, Mr. Yale. Do you have anything further you want
25 to present to me before you have an opportunity to

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1 respond to Ms. Taylor?

2 MR. YALE: No, Your Honor. Thank you.

3 THE COURT: Okay. Thank you, Mr. Yale.

4 Appreciate it. Let me ask you to mute yourself, then.

5 Ms. Taylor, the floor is yours. As I said,
6 you'll get as much time as you'd like, but you'll have at
7 least ten minutes without interruption from me to lay out
8 your argument. Please proceed.

9 MS. TAYLOR: Thank you, Your Honor. First, I'd
10 like to say that, you know, we're here on a motion to
11 dismiss. We're not here on a motion for summary
12 judgment. Our allegations are well pled, pled enough to
13 survive a motion to dismiss and go forward on this. I
14 think that Mr. Yale is very calm, calmly confusing the
15 Court here, and he confuses the regulatory scheme. His
16 discussion now, he miscites the Kam Almaz case, saying
17 that it's an OFAC case. It's not; it was a copyright
18 case. You know, and it doesn't involve OFAC.

19 You know, I'd like to remind the Court here
20 that, you know -- and there were many facts included that
21 were background facts in the original complaint. Our
22 amended complaint is clear. I understand the rule here
23 that's being discussed, but, you know, this case is
24 really about justice for the Plaintiff. This is a
25 legitimate takings case. We note the facts at issue here

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1 are narrow. We don't challenge OFAC's authorization to
2 block.

3 You know, there was a deprivation of property
4 here that bankrupted the entire -- the seed funds for a
5 plane. The owner [brief audio lapse] here has other
6 airline -- has another airline that's very successful,
7 other -- lots of other hotels. They know what they were
8 doing. They had a well planned out business plan. This
9 plane was the start of several routes, lots of contracts,
10 you know, landing rights, et cetera, operation contracts
11 that could not be carried forth. The business was
12 basically hijacked and destroyed with the initial
13 blocking. That's clear.

14 You know, OFAC regulatory issues here can be
15 rather murky and, you know, I think the defense counsel's
16 purposefully, it seems, or maybe not purposefully, but
17 with all due respect, confusing what we're really looking
18 at here. This is actually a simple case, and so for the
19 other distinct facts, you know, we're asking for just
20 compensation for Askan's full business and, you know,
21 which we can get into more later, and we're not here to
22 prove all of the contracts and that entire amount of
23 business and what did exist that was taken, but I think
24 we properly alleged such, that, you know, Askan's
25 reasonably backed expectations here were many licenses,

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1 parking, landing rights, slots, everything that goes with
2 running a legitimate airline business.

3 The routes -- the route that this plane was
4 started with was in dire need. It's a dire -- it's a
5 commuter route. The plan was to also expand into other
6 countries, surrounding countries. And, you know, we can
7 provide that information at a later date.

8 You know, what happened here, there was no SDN,
9 you know, no SDGT, which is a subcategory of an SDN.
10 There was no SDN at all. This is not a criminal case.
11 This is not a criminal blocking. This is civil. This
12 never turned into a criminal OFAC matter. So let's be
13 clear on that, and let's not be confused here about what
14 this -- what really happened here. So our Plaintiff was
15 never suspected as being a criminal. There was never any
16 SDN. That list would have to be public.

17 The purpose of publishing SDNs is so that it
18 provides consistency to the business community to do
19 their due diligence, their compliance, so that they can
20 avoid bad actors. It is not to be opaque. It is not a
21 game of catch-ya, got-ya. That is not how OFAC works.
22 That is not the intent of the regulations here. That is
23 not the intent of the SDN list. And that is not the --
24 the Plaintiff was never an SDN here, was not under
25 investigation, they don't -- OFAC does not block money

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1 during an investigation. That is not how they do it.

2 And so there was no -- the purpose here is, you
3 know, cutting off revenue to SDNs to choke off access to
4 the international trade and economic system, and, you
5 know, the benefits of trading with the U.S. here. This
6 is not something as defense counsel -- which would never
7 be apropos in the international business community that
8 somehow generally international banking in and of itself
9 or even, you know, let's say the airline business is such
10 that it is highly regulated and that any actor can expect
11 for their money to be blocked. That just makes zero
12 sense.

13 That is not what this is about. That is not
14 what the regulations are about. That is not the intent
15 of OFAC. That is not what businesses, actors go into in
16 doing business in the international community. They do
17 not come with the expectation that the money will be
18 blocked. The regulations are for exactly the opposite.
19 The U.S. sanctions policy is aimed at isolating certain
20 countries and entities from the benefits of trade with
21 the United States. It requires transparency to the
22 general public. The policy is not served by purposefully
23 being opaque.

24 Also, we're not requesting the name of the SDN
25 here. We don't need it for a takings claim. We're only

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1 alleging a takings violation, and we're looking at the
2 initial blocking. The facts here, there are a lot of
3 facts here, yes. There are background facts. We are not
4 focusing on the end aspect here of a sua sponte license
5 which was issued, mind you, that OFAC has never done
6 before. You know, we're not focusing on that. That's in
7 the other case. You know, in the other case, we allege
8 APA violations, FOIA violations, 1983 violations, Fifth
9 Amendment due process violations. We do not allege a
10 taking violation. That is what we do here.

11 We are not challenging the validity of OFAC's
12 blocking or their authority here. And the other cases
13 started as an injunction. We're not asking for a certain
14 amount of money damages in that other case.

15 We talk about standing, extraterritorial, that
16 is just absolutely a misapplicaiton of how things work.
17 Defense counsel saying that this is an extra- -- there's
18 no U.S. contact, it's an extraterritorial issue taking,
19 that's just -- absolutely, 100 percent, it's a
20 misapplication of the situation here. And, you know, to
21 say that the nuances of how the banking system works with
22 U.S. dollar transactions is -- doesn't implicate U.S.
23 jurisdiction is absurd.

24 There are lots of other statutes and
25 regulations that we have that allow for blocking of

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1 individuals and persons that have zero contact with the
2 U.S., like the Magnitsky regulations, for instance. You
3 know, Al-Qaeda could come and get -- if they had money
4 blocked -- and get U.S. counsel and go through the system
5 and challenge that blocking.

6 You know, individuals who are sanctioned on the
7 Magnitsky regulations have access to U.S. counsel to get
8 removed from that and to get their money unblocked. So
9 we do provide a process here, and we always have, and
10 it's well established.

11 This was business with a U.S. -- in Arizona.
12 The money went through a Turkish/U.S. correspondent bank,
13 originally to Credit Suisse, and the money went to a
14 Swiss law firm to hold it as a trustee, and the money
15 came back through the system and OFAC directed Deutsche
16 Bank to block. The action came from OFAC here in the
17 U.S. It did not come from overseas. It was not because
18 of bank software. That is not what happened here. It
19 was not a misunderstanding of a name or something like
20 that. That would have been a different type of trigger.
21 That is not what happened here.

22 So this is a -- and, yes, we do say our client
23 is innocent here, but, you know, that doesn't take away
24 from the harm and this being a takings claim. So what I
25 would like to also hit here is that, you know, he says

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1 that the economic impact isn't severe. Like I said
2 earlier, the company went bankrupt. It was almost
3 instantaneous. They could not do any business because
4 they did not know who was the bad actor. There was no
5 published SDN.

6 They did -- hired multiple law firms. The
7 Swiss law firm could not -- also could not find any SDN.
8 They paid for due diligence, attempted to find out. The
9 whole four years, they could not do any further business
10 until they knew what was wrong because they would have
11 run [brief audio lapse] with the money being blocked
12 again, or worse potentially.

13 So without giving -- being given that
14 information and the money being blocked, there was
15 nothing further that they could do. Everyone in that
16 transaction could not act any further for this company to
17 expand or progress on this business. They couldn't
18 purchase another plane. You know, the money's blocked.
19 They couldn't get further financing. They lost all their
20 licenses. You know, and they couldn't -- they couldn't
21 operate.

22 It was imperative at the start of this business
23 to find out what was going on. That money was seed
24 money. It was a deposit for the plane. They could have
25 gone further, and routes were necessary, many routes

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1 would have been flown with that plane. And the money
2 that they would have earned from that plane would have
3 helped for the company to kickstart very quickly. And
4 like I said, our client is an experienced owner of
5 another successful airline.

6 Let me see. I want to make sure that I've hit
7 everything. The regulatory scheme, so defense counsel
8 confuses the -- in discussing what type of -- you know,
9 is it a regulatory taking or is it -- I'm sorry -- a
10 categorical taking. And so, you know, we don't even need
11 to get there at this point. This is a motion to dismiss.
12 You know, we can go into that in-depth later. We say
13 that it's a regulatory taking, but, you know, we allege
14 facts sufficient enough for it to be either of the --
15 either taking to go forward, you know, despite our
16 position here.

17 And so, you know, I think that this is
18 actually, in essence, a simple case. It's a lot simpler
19 than defense counsel would lead the Court to believe. We
20 have alleged facts -- pled facts enough to survive this
21 motion to dismiss, and I understand that the OFAC regs
22 can seem murky. Now, mind you, this was never -- I want
23 to remind the Court, please, let's not get confused here
24 because defense counsel, that would be to his benefit as
25 he attempted to do, this was never a criminal action.

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1 Not all blocking by OFAC is criminal whatsoever. That is
2 a different type of action, and so this is civil. And it
3 has never turned into a criminal OFAC investigation.

4 THE COURT: Where's the taking here?

5 MS. TAYLOR: I'm sorry?

6 THE COURT: Where is the taking here?

7 MS. TAYLOR: The taking happened -- the initial
8 blocking with all the --

9 THE COURT: Okay, okay. Okay. The Plaintiff
10 has its money back, correct?

11 MS. TAYLOR: Not for the entire business, no.
12 The going concern --

13 THE COURT: Excuse me, does Plaintiff have its
14 money back?

15 MS. TAYLOR: Only for the deposit of the plane.

16 THE COURT: Well, how much -- what else did --
17 what else got blocked?

18 MS. TAYLOR: The whole going concern of the
19 business was taken, and that's what's at issue here. As
20 part of the takings clause, the going concern of the
21 business is what was taken, not just the money. And I
22 understand that this may be a case in some respects of
23 first impression here because you've not had a case
24 before with OFAC money like this, and so not -- you know,
25 the entirety of the business was what I mentioned before

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1 -- the operating rights, the landing rights, the parking
2 rights, the slots. That is all extremely expensive. The
3 whole price of purchasing other planes going forward, all
4 of that was gone. The company went bankrupt. It could
5 not move. It was hijacked by the initial blocking, over
6 the course of four years. And mind you, there was not
7 one fact that changed --

8 THE COURT: Can you cite me a case -- Ms.
9 Taylor, stop when I start asking a question, please.

10 MS. TAYLOR: Yes. Yes, Your Honor.

11 THE COURT: Can you cite me a case that allows
12 for the recovery of consequential damages in a takings
13 claim?

14 MS. TAYLOR: I didn't -- we're not alleging
15 consequential damages. We're alleging that the going
16 concern of the business existed at the time that the
17 money was taken and blocked.

18 THE COURT: Well, the Government blocked
19 \$900,000 and change, correct?

20 MS. TAYLOR: Yes.

21 THE COURT: The Plaintiff has that money back
22 with interest, correct?

23 MS. TAYLOR: Yes.

24 THE COURT: And yet now you are asserting that
25 what the Government really blocked was not 900,000 and

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1 change but it blocked the entire business from conducting
2 business?

3 MS. TAYLOR: Yes, and I'd like to refer you to
4 Kimball Laundry, and that's what we rely on. And, yes,
5 it's the same exact situation as Kimball Laundry.

6 THE COURT: Okay. Okay, understood.

7 Under the Supreme Court's test to maintain --
8 for a foreign party to maintain standing to pursue a
9 claim under the Fifth Amendment, is it sufficient, as you
10 read the governing case law for the alleged connection to
11 the United States to arise from the very transaction that
12 gives -- that produces the alleged taking, or must there
13 be preexisting substantial ties to the United States?

14 MS. TAYLOR: One moment, Your Honor.

15 THE COURT: If you don't understand the
16 question, I will ask --

17 MS. TAYLOR: No, I'm sorry --

18 THE COURT: -- I'm happy to repeat it.

19 MS. TAYLOR: No, thank you. I'm just digesting
20 it.

21 You know, I think either way this happened in
22 the U.S. There was substantial context before. At the
23 time of the initial --

24 THE COURT: Okay, what -- okay, what is the
25 substantial contact before?

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1 MS. TAYLOR: Dealing with JetPro in Arizona,
2 the company that they were working with.

3 THE COURT: But that's the transaction that
4 gives rise to the alleged taking; is it not?

5 MS. TAYLOR: No. It's not.

6 THE COURT: What gives rise to the alleged
7 taking?

8 MS. TAYLOR: The transfer of the money through
9 the -- through New York with U.S. correspondent banks.

10 THE COURT: Yes, but --

11 MS. TAYLOR: This is in U.S. dollars.

12 THE COURT: -- that money -- that money only
13 gets transferred through New York because the transaction
14 with JetPro failed, correct?

15 MS. TAYLOR: Your Honor, that's how all U.S.
16 dollar transactions -- that's how all the blocking
17 happens. So that means that there would never be a
18 blocking case ever; there could be a takings case. But
19 that is -- OFAC blocked this. OFAC here in the United
20 States directed Deutsche Bank to --

21 THE COURT: Well, I understand that. No, no,
22 understand that, Ms. Taylor. I read the briefs. I
23 read the complaint. I understand what happened. I
24 understand what is alleged to have happened. I'm not --
25 if we get -- if we ever get to a trial, that can be

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1 proven. The Plaintiff enters a deal with JetPro to
2 acquire an Airbus A320. That transaction does not come
3 to fruition, but as part of that transaction, the
4 Plaintiff puts money in escrow to acquire the plane.
5 That's -- that's the transaction that gives rise to the
6 taking.

7 MS. TAYLOR: No, the --

8 THE COURT: And my --

9 MS. TAYLOR: -- sorry, Your Honor.

10 THE COURT: -- my question is under Verdugo-
11 Urquidez, does the substantial contact with the United
12 States have to preexist the alleged taking, or can it
13 arise from the transaction that produces the alleged
14 taking?

15 MS. TAYLOR: I would say it has to be before,
16 and in this situation, we have the transactions that --
17 you know, there are many -- I could say there are many
18 situations here. Remember, Askan did this voluntarily.
19 There are many situations here that existed before the
20 blocking with contacts with the U.S.

21 THE COURT: And what are they?

22 MS. TAYLOR: Business. Askan voluntarily used
23 a U.S. company to negotiate purchase of this plane,
24 voluntarily did it in U.S. dollars, voluntarily requests
25 that the money be put in the trust holding U.S. dollars

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1 for this deal. And the -- Askan to after that --

2 THE COURT: Okay, Ms. Taylor, can something be
3 -- can somebody do something voluntarily without
4 knowledge? You're on mute, I think. I cannot hear you.

5 MS. TAYLOR: I'm sorry, Your Honor.

6 THE COURT: Can somebody do something
7 voluntarily and not have knowledge?

8 MS. TAYLOR: Can you explain a little bit more,
9 Your Honor?

10 THE COURT: Yes. So the test to have
11 jurisdiction over this alleged taking, the test requires
12 substantial voluntary contacts with the United States by
13 the foreign company, that is, the Plaintiff. I have no
14 doubt that the Plaintiff voluntarily requested the return
15 of its escrow deposit minus Froriep's fee. I don't know
16 if I'm saying Froriep correctly. And in the course of --
17 in the course of that -- of the escrow being refunded to
18 the Plaintiff, the transfer touched the United States.
19 It came through the United States, presumably because it
20 was denominated in dollars.

21 Does Askan have to have had knowledge that the
22 transfer would come through the United States in order to
23 have behaved voluntarily such as to comply with the
24 Supreme Court's test of establishing the voluntary
25 substantial contacts?

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1 MS. TAYLOR: Your Honor, I have a couple of
2 comments in response to that, one, that this deal was
3 specifically done with a U.S. company. Askan had
4 knowledge of it, specifically engaged in a business deal
5 to purchase a plane with a company in Arizona. They knew
6 what they were doing. They had substantial knowledge of
7 that. They chose voluntarily to do the deal in U.S.
8 dollars. They chose voluntarily to put the money in
9 escrow from their U.S. dollar account.

10 They were -- they had the option to purchase
11 planes from other individuals. They -- you know, they're
12 sophisticated actors with lots of other businesses, I
13 would say, and I believe my client would absolutely say
14 that they knew what they were doing and they -- they
15 sought out this company in Arizona as the best company to
16 purchase this plane from and absolutely with all
17 knowledge that this deal in U.S. dollars with -- knowing
18 that -- full well that they were sought out to do their
19 due diligence, of which they did, and do their compliance
20 work concerning the deal with this plane coming from a
21 U.S. company, U -- I'm pretty sure it was a U.S. plane,
22 but I can verify that, with U.S. dollars.

23 And I would say that they knew darn well that
24 they had to comply with U.S. banking regulations, and
25 they did their very best and spent money to do so. They

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1 sought out this company here in the U.S. That was their
2 choice, and they voluntarily did that, and they are a
3 sophisticated actor, like I said. They own another
4 airline.

5 THE COURT: So the transaction with the U.S.
6 company, JetPro, is part and parcel of the transaction
7 that produces the taking?

8 MS. TAYLOR: Absolutely.

9 THE COURT: Okay. I'm hearing something
10 different than I heard from you before.

11 MS. TAYLOR: My apologies.

12 THE COURT: Okay.

13 MS. TAYLOR: Stand a little bit better now.

14 THE COURT: Ms. Taylor, Count 1 of your
15 original complaint in this Court, by which I have to
16 evaluate the Defendant's motion under Section 1500,
17 includes two counts, correct?

18 MS. TAYLOR: Yes.

19 THE COURT: Count 1 is entitled Takings Clause
20 Violation, correct?

21 MS. TAYLOR: I have to look at that. I'm sure
22 that that is correct, if you can give me one second. I
23 can put it --

24 THE COURT: Of course. Page 9 of your original
25 complaint.

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1 MS. TAYLOR: Yes. Takings Clause Violation.

2 Thank you.

3 THE COURT: Okay. Paragraph 37 of your
4 complaint, that complaint, you cite the due process
5 clause of the Fifth Amendment, correct?

6 MS. TAYLOR: Yes, that's what I see, Your
7 Honor.

8 THE COURT: Paragraph 38 of the complaint, you
9 cite the Fifth Amendment due process clause, correct?

10 MS. TAYLOR: Yes, Your Honor.

11 THE COURT: Paragraph 39, you cite the Fifth
12 Amendment due process clause, correct?

13 MS. TAYLOR: Yes, Your Honor.

14 THE COURT: Paragraph 41, OFAC's conduct in
15 violation of Askan's due process rights, correct?

16 MS. TAYLOR: Yes, Your Honor.

17 THE COURT: Where do you cite the Fifth
18 Amendment takings clause in that -- in that first count
19 of your complaint, other than the title?

20 MS. TAYLOR: I'd have to go back through it,
21 but I'm not challenging there -- this is why we've
22 attempted to fix drafting errors with our amended
23 complaint, and I have to say, it does not take away from
24 our -- what we have discussed in our -- Plaintiff's --
25 and that is why we submitted the amended complaint.

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1 THE COURT: The problem -- no, it doesn't take
2 away from what you have discussed on the merits, but the
3 problem is it sure looks a heck of a lot like the
4 allegations that you presented several months previously
5 in the United States District Court. And Congress,
6 whether it makes sense or not -- and I'm not here to
7 argue the text in 1500 is sensible policy, but it's the
8 law. And my job is not -- my old job, when I worked for
9 20 years on Capitol Hill was to go through the law and
10 try to figure out what needs to be changed or if somebody
11 brought something to my attention that this doesn't make
12 sense and I could go through and draft a bill and take it
13 to my principal, the senators I worked for, the
14 congressmen for whom I worked, and I'd say we need to
15 change the law. I don't have that ability anymore, once
16 I accepted this appointment.

17 So Congress, in its -- as we like to say -- its
18 infinite wisdom, back in 1868 says if there's a suit
19 pending in some other federal court, you can't bring a
20 claim for monetary damages in the Court of Claims, what
21 was then the Court of Claims. So I don't go through
22 Count 1 of your initial complaint -- I'm not going
23 through it as an exercise trying to play gotcha, but I'm
24 looking at it, I'm looking at your District Court
25 complaint, of which I may take judicial notice and, of

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1 course, the Government appended it to its motion, but
2 they -- the two sure look as if they're predicated on the
3 same set of operative facts, do they not?

4 MS. TAYLOR: Your Honor, we used the amended
5 complaint to inform of the 1500 analysis, and, you know,
6 we admit that there were drafting errors, and we tried to
7 clarify the operative facts down -- all of the facts are
8 put in there, but as background facts, yes, but we -- you
9 know, the operative facts are different. We could parse
10 out the operative facts of the original complaint, and
11 that's what we tried to do with the amended complaint.

12 THE COURT: Yeah, but, Ms. Taylor, I've got to
13 look at your original complaint in determining whether
14 under -- whether jurisdiction exists under 1500, not your
15 amended complaint. The Federal Circuit has made that
16 crystal clear. If my hands weren't tied, I hear you.
17 Your amended complaint is -- aside from its pagination,
18 it's much cleaner, but --

19 MS. TAYLOR: Yes.

20 THE COURT: -- if we overcome the Section 1500
21 issue, I can -- your amended complaint is what controls
22 the action. Let me go to Count 2 of your original
23 complaint.

24 MS. TAYLOR: Your Honor, I hate to interrupt,
25 but --

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1 THE COURT: Yes.

2 MS. TAYLOR: -- don't -- my apologies, but can
3 I just make one comment before we go to Count 2 on that?

4 THE COURT: Please. Yes.

5 MS. TAYLOR: I'd like to point out that our
6 operative facts for the takings claim are still in the
7 original complaint. They are also in there.

8 THE COURT: That is absolutely true, Ms.
9 Taylor. The problem is that as alleged in the original
10 complaint, those operative facts support a due process
11 claim, not a takings claim, because other than the title,
12 there is no takings claim, and you made a due process
13 claim in the District Court. So the operative facts are
14 there, but they support identical claims in both courts,
15 do they not?

16 MS. TAYLOR: The same operative facts go to
17 support the taking -- the same operative facts that we
18 pulled out to fix the drafting errors that we pulled out
19 to use the amended complaint are also in the original
20 complaint and go to support the takings clause, the
21 takings --

22 THE COURT: That is correct. Where do I have a
23 takings claim in Count 1 of your original complaint?

24 MS. TAYLOR: Your Honor, the -- I just want to
25 repeat what I said, the operative facts are still in

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1 there. The original complaint --

2 THE COURT: But the operative facts --

3 MS. TAYLOR: -- has all of the facts, has all
4 of the facts, and I under- -- I understand, you know, I
5 hear you, but this is -- yes, I'm sorry.

6 THE COURT: Does that not demonstrate, Ms.
7 Taylor, that as your argument proves, does it not, the
8 operative facts exist in your original complaint to
9 support both a takings claim, as you allege in your
10 amended complaint, and to support a due process claim, as
11 you allege in your original complaint --

12 MS. TAYLOR: No.

13 THE COURT: -- I think the operative --

14 MS. TAYLOR: I'm sorry, Your Honor.

15 THE COURT: -- facts are identical in the
16 District Court and here. You just -- you just told me
17 that.

18 MS. TAYLOR: Yeah, but that was -- I'm sorry,
19 but I need --

20 THE COURT: (Inaudible) it come out of your
21 mouth.

22 MS. TAYLOR: Well, I'm sorry, then I need to
23 clarify, Your Honor, here.

24 THE COURT: Yeah, you do need to clarify.

25 MS. TAYLOR: Yes, and I'm going to go back to

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1 the fact that too many operative facts were alleged in
2 the original complaint, and that was an error, and that's
3 why we submitted the amended complaint here. You know, I
4 would say, no, the operative facts, as we discussed and
5 that are in the amended complaint, are -- the operative
6 facts of the takings claim are distinct from the other
7 case, and we do not have those facts detailed out or
8 discussed in the way in the District Court case that we
9 have here. They are distinct.

10 THE COURT: Do you --

11 MS. TAYLOR: The nature of the prior case is
12 such that it is not the same as this. The very nature of
13 the prior case was an injunction. It started as an
14 injunction and expanded upon events that happened during
15 that case.

16 THE COURT: Well, let --

17 MS. TAYLOR: As was here --

18 THE COURT: -- me ask you. Let me go back. Do
19 you accept my initial statement that I must evaluate my
20 jurisdiction under Section 1500 as of the date you filed
21 your original complaint and not your amended complaint?

22 MS. TAYLOR: I would say under these
23 circumstances, I would say that, you know, we had too
24 many facts in the original complaint and I think that
25 with the amended complaint, it provides insight into the

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1 original complaint. So, therefore, with that insight, I
2 think that it very well and justly can survive 1500. And
3 I think that that would be the intent and purpose here.

4 The intent and purpose would not be to just
5 block outright because of drafting errors, and I think
6 that that doesn't serve anybody justice ever and they're
7 not what the courts or Congress are seeking to do. And I
8 understand what Your Honor is saying about how it is
9 drafted, but, you know, this is not a situation where,
10 you know, there weren't too many operative facts put in
11 the original complaint, and, you know, there were some
12 drafting errors, but, you know, everything is well pled
13 within the body of the amended complaint. You have
14 insight into the original complaint. It is not, you
15 know, a game here. They're all legitimate claims.

16 THE COURT: Okay. I don't have any further
17 questions. Go ahead. Do you have anything else, Ms.
18 Taylor? And, of course, I'll give you an opportunity to
19 rebut anything Mr. Yale says in response.

20 MS. TAYLOR: Not at this time, Your Honor.

21 THE COURT: Okay. Thank you, Ms. Taylor. Let
22 me ask you to mute yourself again, and I'll turn back to
23 Mr. Yale.

24 Mr. Yale, and this time I will feel free to ask
25 questions from the getgo, so you don't get a period of --

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1 where you can chatter without my asking questions, but
2 please proceed.

3 MR. YALE: Fair enough, Your Honor. Just a
4 couple of points. On the 1500 issue, with the amended
5 complaint, it's just not relevant. So, I mean, that's
6 black letter law. The other point, the fact that there
7 was an injunction in the District Court, that's
8 irrelevant, and that's Tohono, that's the Supreme Court,
9 that argument is just meritless.

10 Just a couple of other points. On the
11 constitutional standing, you know, the language from
12 Verdugo is pretty clear. There has to be a "free
13 existing, voluntary connection." So, you know, it has to
14 occur -- it can't be a part of the transaction, which is
15 the taking. And so -- but that's not just the Supreme
16 Court there. I mean, there's other -- you know, that's
17 essentially what the Federal Circuit said in that
18 Uzbekistan case that, you know, the taking itself cannot
19 be the basis for the substantial connection. And there's
20 two, you know --

21 THE COURT: Right, but here Ms. Taylor is
22 saying, look, we do have a substantial connection. We
23 have -- the Plaintiff has engaged in a course of conduct
24 with JetPro to acquire a plane. They're negotiating the
25 purchase and the sale. That's the substantial voluntary

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1 contact with the United States, with a U.S.-based company
2 to acquire -- we don't know where the plane was. It
3 doesn't matter where the plane is. But the plane is
4 owned by this JetPro, which I assume is some kind of
5 broker, that I presume buys used planes from airlines and
6 resells them to other airlines.

7 Askan reaches out to Jet pro. They negotiate
8 the purchase of a JetPro-owned airplane. They come to
9 terms, at least I assume they come to terms. They --
10 Askan puts money in escrow, you know, good faith purchase
11 money. As they're going to closing, whatever happens,
12 the deal falls apart. Maybe, you know, on inspection,
13 the plane wasn't in good shape or we don't know. The
14 facts aren't alleged; it doesn't matter. But that's the
15 first substantial voluntary transaction that the
16 Plaintiff has with the United States.

17 Then they ask for the money back, and there's
18 then a second transaction, which crosses -- I mean, these
19 things are all done by wire, right? Nobody's actually
20 counting money across the borders, but they're sending
21 money, and, again, presumably because it was denominated
22 in dollars, which the Plaintiff voluntarily undertook to
23 do, purchase a plane in the United States to be paid for
24 in currency denominated in dollars, because it's
25 denominated in dollars, the transaction is transmitted

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1 through New York. And, there, OFAC said, oop, we got you
2 now. But that's a second -- that's a second transaction
3 as the Plaintiff has it.

4 And the first transaction is the attempted
5 acquisition of the plane by JetPro. Why doesn't that
6 satisfy the Verdugo-Urquidez test?

7 MR. YALE: Well, with all due respect, I think
8 that's -- it's all part of the same deal. The reason why
9 they're getting the payment returned is it's all arising
10 out of the same transaction. Presumably, it's because
11 they had a right to get back the deposit. And I think
12 it's, you know, parallel to the Plot- -- the Plotkin
13 Construction case, where, you know, when this Court was
14 going through the fact that there needed to be a
15 preexisting voluntary connection, it's setting aside the
16 actual course -- that course of conduct with -- between
17 the subcontractor in that case and the United States.
18 And what they're really pointing to are these other --
19 these other contracts with the United States.

20 And the other thing is there's no case where a
21 single transaction with a U.S. company is sufficient for
22 constitutional standing. I think opposing counsel as
23 mentioning that, well, because OFAC was blocking this,
24 because it's a block, then anyone would have -- I think
25 she mentioned Al-Qaeda would be able to have standing to

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1 come in here. Now, we're talking about his
2 constitutional standing. We're not talking about whether
3 or not somebody could go into the District Court or
4 whatnot on some other -- on some other claim. I mean, I
5 think we would contest that Al-Qaeda would have
6 constitutional standing for -- to raise something like
7 this. And so we think that under Verdugo that that's
8 just plainly --

9 THE COURT: Mr. Yale, you don't think 9/11 was
10 a substantial voluntary contact with the United States?

11 That's a joke, sir --

12 MR. YALE: Well, I --

13 THE COURT: I guess that's legal opinion --

14 MR. YALE: I'm not going to touch that one,
15 Your Honor, but I understand what you're saying.

16 THE COURT: No, I take your point, but, again,
17 the challenging -- challenging one's presence on the list
18 is a District Court, it's an APA claim, not a claim for
19 money damages here.

20 MR. YALE: Yeah, there's no -- there's no
21 claim here for that, Your Honor. That's correct.

22 THE COURT: Mr. Yale, let me ask you a
23 question, and I will let you return to the points you
24 want to make, but -- well, I guess, let me -- I'll let
25 you go on, but let me ask you to make sure that at some

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1 point in your response you address the Plaintiff's
2 claim, which I must confess, Ms. Taylor, I don't think I
3 quite clearly understood until I heard your argument,
4 that what the Plaintiff is alleging here as the taking is
5 not simply the blocking of the funds but it is -- it is
6 the -- the taking of the entire business, it arises from
7 the blocking of the funds.

8 And I'd like you, at least at some point, Mr.
9 Yale, to tackle that in the course of your response, but
10 rather than asking you to deal with that head on now,
11 I'll let you go back on the path you wanted to address,
12 as long as you -- as long as I hear your answer on that
13 point at some point in your response.

14 MR. YALE: That's fine, Your Honor. I mean,
15 I'll just address that right now. So, I mean, Kimball
16 Laundry is the case that they cited. Again, in Kimball
17 Laundry, the United States went in and they physically
18 seized an entire laundry business. So what was being
19 seized was a business. In this case, there's no
20 allegation that we went and, you know, took, you know,
21 this business wherever it was located and continued to
22 operate it.

23 In Kimball Laundry, I mean, they were -- the
24 U.S. Government was actually operating this laundry
25 business. And for something like a business, there can

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1 be going concern value. I mean, we pointed to cases,
2 including I think it's the Yuba case from the Federal
3 Circuit that addressed that very -- that very thing, that
4 it's money. Money doesn't have going concern value.

5 I mean, you have to -- under the takings
6 clause, you have to look at the particular property
7 interest involved. And so when a laundry business is
8 seized, that's different from when, you know, there's
9 some allegation with respect to funds. So that's just --
10 I mean, that -- and, you know, the other points about --
11 I'm now hearing something about landing rights --

12 THE COURT: So you're arguing -- your rebuttal,
13 Mr. Yale, is effectively that what the Plaintiff is
14 seeking is, in fact, consequential damages from --

15 MR. YALE: It's at best consequential damages,
16 Your Honor. I would even suspect that something
17 involving, you know, the bankruptcy of a parent company,
18 I'm not even -- I mean, I don't really even see how that
19 rises even to the level of consequential damages, but at
20 best, it's consequential damages. I mean, if -- if the
21 property interest that's being alleged to be taken is,
22 you know, \$30 or \$30 million, it's -- that's what's being
23 taken. It's the money. And so it's not these other
24 things.

25 Otherwise, if, for example, the Government were

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1 ever found to have, you know, engaged in a taking of \$10
2 and that was used -- without that \$10 somebody would have
3 won the lottery or invested in Apple stock or whatnot,
4 but that's just -- that's just not the rule. I mean,
5 it's -- there's a bar on seeking consequential damages.
6 You can at best get what was taken. And so, you know, we
7 think that's pretty straightforward and pretty black
8 letter law.

9 You know, again, I was just mentioning there
10 were some other interests -- landing rights and whatnot,
11 some other contracts. You know, again, that's -- I mean,
12 they're not -- landing rights, just not -- slots,
13 whatever that was, it's not actually alleged in the
14 complaint. Again, what was blocked here was this money,
15 and so that's the property interest the Court has to
16 focus on.

17 And I think with that, Your Honor, I don't
18 think I have anything further.

19 THE COURT: Okay. Thank you, Mr. Yale. I'll
20 give you a chance if you have further rebuttal to Ms.
21 Taylor's next round. I will give you another opportunity
22 to present that, but let me ask you to mute yourself, and
23 let me return to Ms. Taylor.

24 Ms. Taylor, the floor is yours. Please feel
25 free to address any point you would like, either from any

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1 previous questions I raised or in rebuttal to the
2 arguments that Mr. Yale just presented.

3 MS. TAYLOR: Yes, thank you, Your Honor. So,
4 you know, I'd like to go back to the purpose of 1500
5 originally. It was the Civil War. There were all these
6 cases being brought by cotton claimants, and they were
7 bringing exactly the same case for the same damages.
8 That is not the case here, even looking at the District
9 Court case. We do not ask for damages. We do not ask
10 for the going concern of the business. It was a
11 different type of case.

12 And so I'd like -- you know, justice here, it
13 is not just a matter of looking within the black letter
14 of the law here so narrowly that the case that somehow is
15 not perfectly within what has been brought before
16 because, of course, as we all know, there are cases
17 brought that are different all the time and that still
18 are within the purview of the Court, whichever court that
19 may be, whatever the issues may be, and this is one of
20 them. This is OFAC. We have not had a situation -- OFAC
21 blocks money. They have not had a takings case like this
22 before involving OFAC.

23 And so, you know, the property is money. It
24 took the entire business. It is the going concern, just
25 like in Kimball Laundry. Justice would not be served

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1 here in splicing hairs to say that it was only money and
2 the deposit of the plane and, therefore, whatever else
3 happened, we're trying to discredit the value and the
4 immense expense and the hurdle and the difficulty in
5 getting slots, which are very expensive, and getting
6 landing rights, parking rights, and starting an airline
7 business, negotiating for the purchase of this plane,
8 which the plane then needs to start operating and going
9 forward. There is no justice served here in discrediting
10 this whatsoever, which is what defense counsel is trying
11 to do here. And it's not fair to do so.

12 You know, there are no consequential damages
13 here. A claim against OFAC to allege that -- or not to
14 allege, to state and assert that the only type of damages
15 that could ever be sought in an OFAC case would be
16 consequential damages in a situation like this, it was
17 just clearings a takings claim, is absurd. And, you
18 know, I would say the intent and purpose here, you know,
19 of providing full and perfect equivalent compensation in
20 takings cases, and that is exactly what is entitled our
21 client here. And, you know, there was no -- yeah, mind
22 you, facts never changed from -- and at all -- from the
23 time of the original taking through for four years, okay?

24 Our client was never -- please, I want to
25 remind you -- was never on any list. There was never

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1 anybody in the transaction on any list. Lists have to be
2 public. And there was no SDGT ever taken off during the
3 time period between when the money got -- was released by
4 OFAC sua sponte, which mind you, has never happened
5 before. OFAC doesn't give back money on a sua sponte
6 basis without an application being filed.

7 So, you know, the time period of four years
8 here, an indefinite amount of time for when they might
9 get their money, does equal a permanent taking here. The
10 harm is severe. It is adequate. We are talking about a
11 motion to dismiss. We have properly pled our claims.
12 You know, and the purpose here is met under 1500. We are
13 not bringing the same case. We are not asking for the
14 same remedy. We are not using the same operative facts
15 here, and that is -- that is what's key. We are not
16 going forward here on a case that is identical with the
17 same facts as -- and what we're seeking. We are not
18 seeking the same [brief audio lapse] prior case.

19 THE COURT: Ms. Taylor, hasn't the Supreme
20 Court told us that it doesn't matter, it is irrelevant
21 that you're not seeking the same relief?

22 MS. TAYLOR: I would say the purpose behind --

23 THE COURT: And that's exactly what Tohono
24 stands for.

25 MS. TAYLOR: So --

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1 THE COURT: Tohono says it doesn't matter if
2 you're not seeking the same relief.

3 MS. TAYLOR: We're not using the same operative
4 facts here. You know, so the purpose of 1500 is met in
5 this case. This case, in reality, is -- operates off of
6 different -- uses different operative facts. It does not
7 use substantially the same facts. It's a gigantic world
8 of fact in this case, and I understand that factually it
9 can -- it can easily be confusing, but, here, we -- this
10 is a legitimate case, legitimately under 1500,
11 legitimately seeking -- using different operative facts
12 from a different transaction which was the original
13 blocking, the whole business being gone.

14 And, you know, just like Kimball Laundry, all
15 of these other rights and clients and licenses do mean
16 something. It doesn't have to be identical to a laundry
17 for that case to apply. We all know that. So let's not
18 get confused here with that. And I understand that this
19 is an OFAC case which is a different type of takings case
20 that has not come before the Court before, but it is 100
21 percent a legitimate takings case with legitimate claims,
22 with a client who has done nothing here -- nothing wrong.

23 There was no -- there's no SDN, SDGT. No one
24 in this transaction was ever involved in any of this.
25 Substantial U.S. context, to try to say that the whole

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1 business deal with a U.S. company that is selling them a
2 plane is not substantial contact -- context is -- you
3 know, previous to the taking, is, you know, is against
4 the U.S. interest in having businesses, you know, seeking
5 out -- I'm sorry, to do business with U.S. businesses.
6 It's against our interest, and it's not the purpose of
7 the blocking provisions.

8 And so let's not get confused here. DOJ is
9 definitely trying to confuse the issue here and act like
10 it's one of, you know, potential criminal, you know,
11 scary situation involving terrorists. That's not what
12 happened here. Nobody's on any list. Nobody was ever
13 published. You have to be published to be on an S -- to
14 be an SDN. That's the way it works. And they don't
15 unblock money during an investigation because they don't
16 want to tip off whoever it might be. That is not how it
17 works.

18 And so, you know, I have to say that this is
19 definitely, 100 percent a case that comports with the
20 purpose of the jurisdiction of this Court. It is a
21 different type of case, different than the prior one -- I
22 mean than the other court case, different facts,
23 different relief -- different -- it is 100 percent
24 distinguishable from the other case as we discussed.

25 This is not just black letter in a vacuum. To

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1 use black letter just to throw out this case is not, you
2 know, the purpose of the jurisdiction of this Court.

3 THE COURT: Ms. Taylor, I'm a trial court. My
4 job is to apply the black letter law. The black letter
5 law is a problem, that's a job for the Court of Appeals
6 or the Supreme Court. Do you have anything further?

7 MS. TAYLOR: Well, like I said, looking at the
8 black letter law, you also look at the purpose of what
9 you're applying, and I believe that the purpose of 1500
10 is so that you don't bring the same cases. And as we've
11 discussed in the -- looking at everything in the totality
12 of the situation here -- different facts, like I said
13 many times -- this is not the same case, and it comports
14 with 1500 looking at that. The purpose of 1500 --

15 THE COURT: The problem, Ms. Taylor, is
16 (inaudible) --

17 MS. TAYLOR: -- is to throw out identical
18 cases.

19 THE COURT: You've said that multiple times,
20 but a reading of your complaint -- your original
21 complaint here, which is all I can look at, not your
22 amended complaint, and a reading of your District Court
23 amended complaint belies what you've said here. It
24 undercuts what you've said here.

25 MS. TAYLOR: I think I addressed that --

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1 THE COURT: They're not different facts.
2 They're the same claims.

3 MS. TAYLOR: So the -- that includes more
4 operative facts and from the other case, but we carve out
5 the operative facts as we do with -- as I stated with the
6 amended complaint.

7 THE COURT: Which I can't look at.

8 MS. TAYLOR: I think I responded earlier
9 that --

10 THE COURT: You did, but the Federal Circuit
11 disagrees with you.

12 MS. TAYLOR: Okay. You know, Judge, Your
13 Honor, with all due respect, I think that this is within
14 the intent and purpose. It is within 1500, and I
15 understand what you're saying, but I think that there is
16 room 100 percent for this case. It is a different case,
17 and the entire complaint doesn't need to be read to carve
18 out, you know, the facts here. And I think that, you
19 know, the primary -- I mean, the substantial operative
20 facts here are all in the complaint, the original
21 complaint. There was more operative facts in there than
22 what needed to be included. And like I said, we
23 clarified with the amended complaint.

24 And, yes, it was poorly drafted, which is why
25 we filed an amended complaint, and I have to say but it

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1 doesn't take away from it being within the purpose of
2 1500, and this is not the same case, and we've
3 established that on our record. This is not suddenly
4 going to be a case that changes and becomes a different
5 case. We're not going to suddenly, if we go forward,
6 beyond and survive the motion to dismiss, this is not a
7 situation where we're suddenly going to bring in all the
8 same facts and turn it into the same case. Absolutely
9 not. We've been very forthright with the Court here.

10 THE COURT: I have not questioned that.

11 MS. TAYLOR: No, I know.

12 THE COURT: I appreciate that, Ms. Taylor. No,
13 I say, I understand your argument and again, I fully
14 appreciate that Section 1500 has been subject to strong
15 criticism from the Supreme Court on down. Whether its
16 purpose is -- remains useful or not is questioned by --
17 has been questioned by a number of my colleagues, as well
18 as higher courts, and I promise you it is something I
19 will take a very close look at when I -- when I repair to
20 my chambers after this argument.

21 Do you have anything further, Ms. Taylor, at
22 this point?

23 MS. TAYLOR: No, Your Honor. Thank you very
24 much.

25 THE COURT: Mr. Yale, anything further, from

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1 the Government?

2 MR. YALE: No, Your Honor.

3 THE COURT: Okay, thank you.

4 Counsel, thank you both very much for your --
5 for the high-quality briefing that presented the case
6 extremely well in preparation for this argument. It made
7 my preparation for the argument easier than sometimes it
8 has been. I have to say, I didn't stumble on relevant
9 cases that were not cited by either party, so for that I
10 thank you, and thank you both for your capable and, Ms.
11 Taylor, impassioned argument this morning, and I should
12 emphasize, appropriately impassioned.

13 I don't want to leave -- I do not want to leave
14 any misimpression that you crossed any lines. You did
15 not in any way, shape, or form. You advocated on behalf
16 of your client's interests ably, and I appreciate that.

17 I will reserve judgment and will try to get an
18 opinion out expeditiously. And obviously if I grant the
19 Defendant's motion, we'll enter judgment. And, Ms.
20 Taylor, if I go that route, you'll be able to take me up
21 and see if you can't get clarification of the law in
22 Section 1500. And if I deny the Government's motion,
23 then we will proceed -- we will proceed here, and I will
24 -- I will convene us for a status conference, where we
25 will try to do some scheduling going forward if we get to

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1 that.

2 But at least for today, I have nothing further,
3 so let me just -- one final opportunity.

4 Mr. Yale, anything further before I adjourn us?

5 MR. YALE: No, Your Honor.

6 THE COURT: Ms. Taylor -- thank you, Mr. Yale.

7 Ms. Taylor, anything further?

8 MS. TAYLOR: No, Your Honor. No, Your Honor.

9 THE COURT: Okay.

10 MS. TAYLOR: Thank you so very much.

11 THE COURT: Thank you all very much, Counsel.

12 We stand adjourned. Thank you. Bye-bye.

13 (Whereupon, the hearing was adjourned at 11:54
14 a.m.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Sara J. Vance, court-approved transcriber,
4 certify that the foregoing is a correct transcript from
5 the official electronic sound recording of the
6 proceedings in the above-titled matter.

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10 DATE: 8/31/2021 s/Sara J. Vance
11 SARA J. VANCE, CERT

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